

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JEFFREY ANTHONY FRANKLIN,

Plaintiff,

v.

GEORGE GIURBINO, et al.,

Defendants.

Case No. [15-cv-04755-YGR](#) (PR)

**ORDER GRANTING AN EXTENSION
OF TIME TO APPEAL**

This federal civil rights action, now closed, was filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner. On January 3, 2017, the Court granted Defendants' motion to dismiss the Eighth Amendment claims against them, upon resolving the issue of qualified immunity asserted in their Rule 12(b)(6) motion. Dkt. 32. The Court also dismissed the remaining Eighth Amendment claims against the unserved Defendants with prejudice. *See id.* The Court entered judgment on the same date. Dkt. 33.

On March 2, 2017,¹ Plaintiff filed a motion to extend the time to appeal under Federal Rule of Appellate Procedure 4(a)(5) due to lock downs at the prison, which have prevented him from filing a timely appeal. Dkt. 34. While the record shows that Plaintiff filed a notice of appeal on March 7, 2017 (*see* dkt. 35), the Court construes the March 2, 2017 motion as a notice of appeal.

In an Order dated April 20, 2017, the Ninth Circuit Court of Appeals noted as follows:

A review of the record demonstrates that the March 7, 2017 notice of appeal was not filed or delivered to prison officials within 30 days after entry of the January 3, 2017 judgment. However,

¹ Plaintiff's motion was served to prison officials for mailing on March 2, 2017, and it was stamped "filed" by the Clerk of the Court on March 7, 2017. *See* Dkt. 34. As a *pro se* prisoner, Plaintiff receives the benefit of the prisoner mailbox rule, which deems most documents filed when the prisoner gives them to prison officials to mail to the court. *See Stillman v. LaMarque*, 319 F.3d 1199, 1201 (9th Cir. 2003). Because the motion was served on prison officials for mailing on March 2, 2017, the Court will deem the motion filed as of that date.

1 appellant filed a timely motion for an extension of time to appeal
2 pursuant to Federal Rule of Appellate Procedure 4(a)(5), which was
served on March 2, 2017 and received by the district court on
March 7, 2017. The district court has not ruled on that motion.

3 Accordingly, this appeal is remanded to the district court for the
4 limited purpose of allowing that court to rule on appellant's March
7, 2017 motion.

5 The district court is requested to serve a copy of its decision on this
6 court at its earliest convenience. Briefing is stayed pending further
order of this court.

7 Dkt. 39 at 1.

8 Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal "be
9 filed with the clerk of the district court within 30 days after the entry of the judgment or order
10 appealed from." Fed. R. App. P. 4(a)(1). Relief from the deadline for a timely notice of appeal
11 may be obtained by a motion in the district court under Rule 4(a)(5), which allows for an
12 extension of time if the party requests it within thirty days of the expiration of the time to file the
13 notice and shows excusable neglect or good cause. *See* Fed. R. App. P. 4(a)(5).


14 Here, Plaintiff filed his motion to extend the time to appeal within thirty days of the
15 expiration of the time to file his notice of appeal (February 2, 2017), and the request shows good
16 cause. Accordingly, the Court GRANTS Plaintiff an extension of time to appeal *nunc pro tunc* to
17 March 2, 2017, the date he filed the instant motion, which has also been construed as a notice of
18 appeal.

19 The Clerk shall forward a copy of this Order to the Ninth Circuit.

20 This Order terminates Docket No. 34.

21 IT IS SO ORDERED.

22 Dated: April 25, 2017

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24 YVONNE GONZALEZ ROGERS
25 United States District Judge
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